

# California Western Law Review

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Volume 38 | Number 1

Article 7

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2001

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### Recommended Citation

Cardiff, Todd T. (2001) "Conflict in the California Coastal Act: Sand and Seawalls," *California Western Law Review*. Vol. 38 : No. 1 , Article 7.

Available at: <https://scholarlycommons.law.cwsl.edu/cwlr/vol38/iss1/7>

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## CONFLICT IN THE CALIFORNIA COASTAL ACT:

### SAND AND SEAWALLS

*Todd T. Cardiff\**

#### I. INTRODUCTION

*"Seawalls damage virtually every beach they are built on. If they are built on eroding beaches—and they are rarely built anywhere else—they eventually destroy [the beach]."*<sup>1</sup>

Coastal landowners in California are building seawalls at an alarming rate.<sup>2</sup> Currently, shoreline armoring<sup>3</sup> occupies between 130 and 150 miles of California's 1,100-mile coastline.<sup>4</sup> Unfortunately, seawalls have a disastrous effect on the public beach.<sup>5</sup> On an eroding beach, seawalls will eventually

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1. CORNELIA DEAN, *AGAINST THE TIDE, THE BATTLE FOR AMERICA'S BEACHES* 53 (1999). Cornelia Dean is the science editor for the *New York Times*.

2. In the last two years seawalls have been permitted to protect fifteen properties in Solana Beach, CA. *See, e.g.*, Cal. Coastal Comm'n Application No. 6-99-103 (shoreline armoring permit protecting seven properties, approved Oct. 14, 1999); Application No. 6-99-56 (shoreline armoring permit protecting three properties, approved May 12, 1999); Application No. 6-99-91 (approved Jan. 12, 2000); Application No. 6-00-66 (shoreline protection permit protecting two properties, approved Oct. 10, 2000); Application No. 6-00-36 (shoreline armoring protecting two properties, approved March 13, 2001); and Application No. 6-00-138 (shoreline armoring protecting two properties, approved Mar. 13, 2001). *See also* pleadings at 1 Calbeach Advocates v. City of Solana Beach, Case No. GIN010294, (filed Jan. 25, 2001 San Diego Superior Court) (on file with author).

3. "Shoreline armoring" is a generic term for any hardened structure used to protect against wave action, such as seawalls, revetments, rip-rap, and bulkheads. In this Comment the terms "seawalls" and "shoreline armoring" will be used interchangeably.

4. *See* SURFRIDER FOUNDATION: *STATE OF THE BEACH* 10 (2000) (noting that 1990 statistics showed 130 miles of seawalls in California and that California has experienced two El Niños in the 1990s). *See also* Gary B. Griggs, *Bringing Back the Beaches—A Return to Basics*, available at <http://www.wetsand.com> (last visited Nov. 15, 2000) (noting that approximately 14% of California is armored).

5. *See generally* DEAN, *supra* note 1; ORRIN H. PILKEY & KATHARINE L. DIXON, *THE CORPS AND THE SHORE* (1996); WALLACE KAUFMAN & ORRIN PILKEY, *THE BEACHES ARE MOVING, THE DROWNING OF AMERICA'S SHORELINE* (1979) (explaining the adverse impacts of seawalls).

destroy the beach, leaving no dry sand area for recreation.<sup>6</sup> Furthermore, beach replenishment projects, the primary method for restoring beaches destroyed by seawalls, are extremely expensive and increase the width of the recreational beach for only a very short time.<sup>7</sup>

Beaches are vital to California's economy, generating fourteen billion tourism dollars per year.<sup>8</sup> From a purely economic viewpoint, California's beaches are considerably more important to the overall economy than the property that shoreline armoring is designed to protect. Shoreline armoring only benefits the incredibly small minority of the population that owns property directly on the coast, while it decreases access to the millions of people who flock to the beach every year.<sup>9</sup>

Coastal property owners claim they have both constitutional and statutory rights to protect their property with shoreline armoring.<sup>10</sup> Under the current interpretation of the Coastal Act,<sup>11</sup> Coastal landowners are permitted to build a seawall if their primary structure is endangered by erosion. However, as this Comment will demonstrate, it was never the Legislature's intent to protect structures built after 1976.

In 1976, when the California legislature passed the Coastal Act, the legislature was aware of the adverse impacts of seawalls.<sup>12</sup> California Coastal Act section 30253 mandates that:

New development shall . . . [a]ssure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or *in any way require the construction of protective devices* that would substantially alter natural landforms along bluffs and cliffs.<sup>13</sup>

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6. Nicholas C. Kraus, *The Effects of Seawalls on the Beach: An Extended Literature Review*, Special Issue, J. COASTAL RES., 1, 4 (1988) (However, Kraus disputes whether active erosion is supported by scientific evidence.).

7. See SAN DIEGO REGIONAL BEACH SAND PROJECT FINAL ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL ASSESSMENT, State Clearinghouse No. 1999041104 (2000) (The sand replenishment project will add two million cubic yards of sand to San Diego's beaches at a cost of fourteen million dollars. The sand is expected to last one to five years.).

8. Philip King, *Executive Summary of 1999 Report on: The Fiscal Impact of Beaches*, at <http://userwww.sfsu.edu/~pgking/beaches> (last visited Nov. 18, 1999) (report prepared for the California Department of Boating and Waterways).

9. For an excellent documentary film see the video by Eden Productions, *LIVING ON THE EDGE* (1998) (available from the Surfrider Foundation at <http://www.surfrider.org>, 122 S. El Camino Real, #67, San Clemente, CA 92672).

10. See *Whaler's Village Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 252 (1985) (landowners arguing they have a vested right to protect property).

11. CAL. PUB. RES. CODE § 30000 et. seq. (2001) [hereinafter Coastal Act § 30000 et. seq.].

12. See CALIFORNIA COASTAL PLAN 89 (1975). The California Coastal Plan was prepared prior to the coastal act pursuant to Proposition 20 (1972). See CAL. PUB. RES. CODE § 27320.

13. Coastal Act § 30253 (2001) (emphasis added).

New development must have sufficient setback from the edge of a bluff or high tide line so that a seawall is not needed in the future. Unfortunately, coastal landowners continue to build too close to the shoreline,<sup>14</sup> often intentionally subverting the Coastal Act in exchange for a better view or an increase in the floor area of their coastal home.<sup>15</sup> As the shoreline erodes to within ten or fifteen feet of the house, the coastal homeowner then argues that the Coastal Act guarantees shoreline protection because their home is in imminent danger of destruction from shoreline erosion.<sup>16</sup>

Coastal Act section 30235 states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls and other shoreline construction that alters natural shoreline processes shall be permitted to protect *existing structures* . . . in danger from erosion when designed to minimize or mitigate adverse impacts to shoreline sand supply. . .<sup>17</sup>

As Coastal Act section 30235 is currently interpreted, there is a policy conflict between the requirement that all new development have sufficient setback so that shoreline armoring is unnecessary in the future and the policy of protecting existing structures in danger from erosion. The ultimate question in resolving this conflict is: What is the definition of “existing structure”?

This Comment explores the policies and the current conflict with shoreline armoring in California. It begins with a discussion of shoreline processes, explaining the destructive force of shoreline armoring. Next, the conflict between Coastal Act sections 30253 and 30235 is more fully explored, with an eye towards understanding the legislative history and the intent of the legislature. The coastal property owners’ claim that building a seawall is a constitutional right is examined by investigating current case law, both within and outside of California. Finally, three options to resolve this conflict are presented: legislative, administrative, and judicial.

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14. See Gary Griggs & Lauret Savoy, *Building or Buying on the Coast*, in *LIVING WITH THE CALIFORNIA COAST* 35, 35 (Gary Griggs & Lauret Savoy eds., 1985).

15. Setbacks from streets and other property lines are fixed. In many areas though, the setback from the bluff’s edge is determined by 75-year erosion rates. California Coastal Commission, Periodic Review of the San Luis Obispo County Certified Local Coastal Program, at 269-70 (Prelim. Rep., Feb. 2, 2001), available at <http://www.coastal.ca.gov/web/recap/rctop.html>. By declaring an overly optimistic erosion rate of two to three inches a year, a coastal landowner may build as close as twenty-five feet from the bluff edge. *Id.* at 271. This not only provides a great view, but also allows for an increase in square footage of the house. See also, Staff Report, Cal. Coastal Comm’n Amendment Application No 4-83-490-A2, 24 n. 25 (approved Nov. 14, 2001) (noting that the bluff setback was based on an estimated three inches per year erosion rate, but geologists subsequently estimated a bluff retreat rate of forty-eight inches per year).

16. See Coastal Act § 30235 (2001).

17. *Id.* (emphasis added).

## II. SHORELINE PROCESS AND SEAWALLS

Shoreline armoring destroys the beach in three main ways: occupation loss, passive erosion, and active erosion.<sup>18</sup> *Occupation loss* is simply the area of the public beach that is physically occupied by the seawall.<sup>19</sup> *Passive erosion* is the narrowing of the beach in front of a seawall because seawalls fix in place the back end of the beach, preventing the retreat of the bluff or shoreline, while the lower beach continues to erode.<sup>20</sup> *Active erosion* is sand loss caused by waves rebounding off of the seawalls themselves and scouring away the sand.<sup>21</sup>

The first step in understanding the damaging nature of seawalls is to understand fundamental beach processes. Beaches in California are created from sediment transported to the ocean by rivers, streams, and eroding bluffs.<sup>22</sup> Once the sand reaches the coastline, the sand is transported along the coast by side-shore currents, also called the long-shore currents or littoral drift.<sup>23</sup> Beaches are sometimes characterized as rivers of sand because of this constant movement.<sup>24</sup> Unfortunately, this river of sand is often cut-off at its source by dams, development, flood control projects, and seawalls; and once the sediment does reach the beach, it is often held up by harbors, jetties and groins.<sup>25</sup>

The recreational area of the beach, also called the dry sand area,<sup>26</sup> makes up only a small portion of the total sand at a beach.<sup>27</sup> Ninety percent of the

18. Orrin H. Pilkey & Howard L. Wright III, *Seawalls Versus Beaches*, Special Issue 4, J. COASTAL RES., 41, 43 (1988). See also Video, *Living on the Edge* (Eden Productions, 1998) (available from the Surfrider Foundation) (Gary Griggs and Scott Jenkins explaining the effects of shoreline armoring).

19. Pilkey & Wright, *supra* note 18, at 43 (asserting that a seawall located on a public beach will naturally prevent use of the beach that it is physically occupying).

20. DEAN, *supra* note 1, at 53; PILKEY & DIXON, *supra* note 5, at 40. See also Gary B. Griggs, *Bringing Back the Beaches—A Return to Basics*, available at <http://www.wetsand.com> (last visited Nov. 15, 2000).

21. See DEAN, *supra* note 1, at 53-55; KAUFMAN & PILKEY, *supra* note 5, at 208; and Griggs et al., *Understanding the Shoreline*, in LIVING WITH THE CALIFORNIA COAST 7, 22 (Gary Griggs & Lauret Savoy eds., 1985) (noting that seawalls block sand supply and cause erosion from wave rebound).

22. Griggs et al., *supra* note 21, at 14. Griggs also notes that in Southern California some beaches are created and maintained by the dredging of harbors. *Id.* at 21-22.

23. See KAUFMAN & PILKEY, *supra* note 5, at 81. Technically, littoral drift is the actual movement of the sand, whereas long shore currents are the side shore currents that cause the littoral drift. Griggs et al., *supra* note 21, at 11.

24. See PILKEY & DIXON, *supra* note 5, at 29; Griggs et al., *supra* note 21, at 15.

25. Katharine E. Stone, *Sand Rights: A Legal System to Protect the "Shores of the Sea,"* STETSON L. REV. 709, 711-12 (2000).

26. See, e.g., Coastal Act § 30211 (2001) ("Development shall not interfere with the public's right of access . . . including the use of dry sand and rocky coastal beaches to the first line of vegetation").

27. See PILKEY & DIXON, *supra* note 5, at 91 (showing a comparison of a sand replenishment to size of shoreface and zone of active sand movement (underwater sand)).

beach is underwater.<sup>28</sup> A beach with an inadequate supply of sand input may experience increased coastal erosion (the shoreline will move back), but the width of the beach, in the long run, will not change.<sup>29</sup> However, if the back part of the beach is fixed by a seawall, the shoreline cannot move back. The sandy beach will continue to erode, and eventually the dry sand area of the beach will disappear.<sup>30</sup> In some cases, seawalls will artificially increase the slope of the beach profile.<sup>31</sup> The importance of this concept cannot be overstated, because it is crucial to an understanding of a number of different cause-and-effect relationships in coastal processes.<sup>32</sup> For example, people are often struck by how temporary the benefits of beach replenishment are.<sup>33</sup> The increases in the beach width may last only one season.<sup>34</sup> A sand-starved beach has a steep profile. When sand is added to the upper beach, the beach simply adjusts, seeking equilibrium and the beach profile is temporarily flattened.<sup>35</sup>

On a natural beach, the sand will act as a shock absorber protecting the shoreline from wave energy.<sup>36</sup> High-energy waves will take a portion of the dry sand area and coastal bluff and redistribute it underwater to form sand bars.<sup>37</sup> These sand bars will cause substantial wave energy to disperse before it reaches the shoreline.<sup>38</sup> In many areas of California, a steep narrow beach will be backed by a cliff, which will be subjected to intense wave energy.<sup>39</sup>

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28. See KAUFMAN & PILKEY, *supra* note 5, at 89; DEAN, *supra* note 1, at 158; Griggs et al., *supra* note 21, at 11.

29. Aram V. Terchunian, *Permitting Coastal Armoring Structures: Can Seawalls and Beaches Coexist?*, Special Issue 4, J. COASTAL RES. 65, 67-68 (1988).

30. PILKEY & DIXON, *supra* note 5, at 40; Kraus, *supra* note 6, at 4.

31. Pilkey & Wright, *supra* note 18, at 59. *Contra* Kraus, *supra* note 6, at 4 (finding no increase in beach slope in front of seawalls, compared to "unstabilized" beaches); and Gary B. Griggs & James F. Tait, *The Effects of Coastal Protection Structures on Beaches Along Northern Monterey Bay, California, Seawalls Versus Beaches*, Special Issue 4, J. COASTAL RES. 93, 102 (1988) (noting that beach profile in front of seawalls did not change). Griggs, however, notes that seawalls may cause "wave wash or reflection that actually removes sand from the beach in front of a seawall." Griggs et al., *supra* note 21, at 22. A current study by Scott Jenkins, an oceanographer at Scripps Institute of Oceanography has found significant increase in the slope of the beach profile in front of seawalls compared to beaches in front of unprotected cliffs in Solana Beach and Del Mar, CA. (Data on file with author).

32. See DEAN, *supra* note 1, at 27.

33. See *id.* at 96; KAUFMAN & PILKEY, *supra* note 5, at 216.

34. SAN DIEGO REGIONAL BEACH SAND PROJECT ENVIRONMENTAL IMPACT REPORT/ENVIRONMENTAL ASSESSMENT, State Clearinghouse No. 1999041104, 4.1-5 (2000).

35. See DEAN, *supra* note 1, at 96; KAUFMAN & PILKEY, *supra* note 5, at 216. For diagrams of wave and beach profile dynamics see KAUFMAN & PILKEY (illustration at 206-07); Griggs et al., *supra* note 21, at 8.

36. Griggs et al., *supra* note 21, at 13.

37. *Id.* at 8.

38. *Id.* Naturally coastal erosion increases during storm events coupled with extreme high tides. *Id.* at 22.

39. See *id.*

Eventually, the cliff will fail, adding more sand to the system and again flattening the beach profile.<sup>40</sup>

On a sand-starved beach backed by seawalls, however, waves break closer to shore and wave energy against the bluff or seawall increases.<sup>41</sup> The land behind the seawall will not erode (which is the purpose of a seawall), yet the shoreline will continue to retreat adjacent to the wall. Studies have shown that the rate of erosion to the shoreline adjacent to a seawall will actually increase due to wave reflection and increased wave energy surrounding a seawall.<sup>42</sup> This has led preeminent coastal geologists to note that once shoreline armoring begins, it seldom stops, because neighboring properties will soon build a seawall to protect their property as well.<sup>43</sup> Furthermore, the increased wave energy rebounding off of seawalls will exacerbate sand loss on an already depleted beach.<sup>44</sup>

In California, the wallification of the coast is reaching epic proportions.<sup>45</sup> In 1990, seawalls armored over 130 miles of shoreline, approximately 12% of California's 1,100-mile shoreline,<sup>46</sup> and the wallification of the coast has increased in the last decade.<sup>47</sup> It is estimated that 25% of the total sand supply is contributed by bluff erosion.<sup>48</sup> Even accepting this estimate, armoring 12% of the coast creates a significant cumulative effect on the volume of sand placed into the coastal system.

40. *Id.*; Nat. Res. Council, MANAGING COASTAL EROSION 24 (1990). Griggs estimates that bluff erosion does not contribute more than 25% of the beach sand. Griggs et al., *supra* note 21, at 15.

41. Terchunian, *supra* note 29, at 67.

42. Griggs & Tait, *supra* note 31, at 101-02.

43. Pilkey & Dixon, *supra* note 5, at 51-53 (noting ten truths about shoreline armoring. (1) Destroys beaches, is ugly and blocks access; (2) There is no need for armoring unless someone builds too close to the shoreline; (3) Small number of people create the need; (4) Once you start you cannot stop; (5) It costs more to save the property than it is worth; (6) Shoreline armoring begets more shoreline armoring; (7) Shoreline armoring grows bigger; (8) Shoreline armoring is a politically difficult issue because of its long-term impacts; (9) Shoreline armoring is a politically difficult issue because no compromise is possible; (10) You can have buildings or you can have beaches; you cannot have both).

44. Active erosion, beach erosion caused by wave rebound, is still highly controversial in the scientific community. *See generally* Krause, *supra* note 5, at 1 (disputing whether beach profile increased because of seawalls). Griggs & Tait, *supra* note 31, at 93 (study noting in northern Monterey, where seasonal beach profile rebounded as quickly with a seawall). *See also* Pilkey & Wright, *supra* note 18, at 59 (explaining the academic debate between active erosion and passive erosion).

45. *See* Video: Eden Productions, LIVING ON THE EDGE (1998) (Mark Massara, Esq., Coastal Director of the Sierra Club, coining the word "wallification").

46. SURFRIDER FOUNDATION, STATE OF THE BEACH 10 (2000) (noting that in 1990 there was 130 miles of shoreline armoring in California).

47. Statistics on shoreline armoring for 1990-1999 are not yet available. It is a reasonable assumption that at least 20 miles of additional shoreline armoring were constructed in the last decade.

48. Griggs et al., *supra* note 21, at 15.

The ultimate impact of the current shoreline-armoring trend is the loss of the public beach. According to State and Federal law, the beach below the mean high-tide line is owned by the State and held in trust for the people.<sup>49</sup> In many areas of California, the public owns the dry sand area of the beach, but even in areas where dry sand area is privately owned, the public has the right to use the beach for access to the public land.<sup>50</sup> If halting the natural retreat of the coastline narrows the recreational beach and harms public property,<sup>51</sup> should California allow property owners to protect their property at the expense of public property? Should nuisance law prevent the cumulative destruction of public property? Does it make economic sense to favor the protection of private property when public beaches are the most popular tourist destination in the United States,<sup>52</sup> considering the expense of sand replenishment?<sup>53</sup>

### III. HISTORY OF THE CALIFORNIA COASTAL ACT

#### A. Legislative Intent

In the late 1960s and early 1970s Californians became increasingly aware of the need for a comprehensive plan to conserve and preserve the State's 1,100-mile coastline.<sup>54</sup> In 1970, less than one quarter of California's coast was legally accessible to the public,<sup>55</sup> and coastal land was being subjected to a tremendous amount of public and private development at the expense of long-term conservation.<sup>56</sup> Development interests controlled the majority of California's city and county planning commissions.<sup>57</sup> It was evident

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49. *Lachuza Villas West v. Cal. Coastal Comm'n*, 60 Cal. App. 4th 218, 235 (1997) ("The State owns all tidelands below the ordinary high water mark, and holds such lands in trust for the public") (citations omitted).

50. Coastal Act § 30211 (2001).

51. KAUFMAN & PILKEY, *supra* note 5, at 89.

52. James R. Houston, *International Tourism and U.S. Beaches*, SHORE AND BEACH, Apr. 1996, at 3. *See also*, *Fun at the Sea: Coastal Tourism, Recreation*, SEA TECH., Oct. 1998, at 3 (noting that 90% of all tourist dollars are spent in Coastal States and 180 million people visit the coast each year).

53. *See* Terry Rodgers, *Deficit May Reduce Beach Sand Project*, SAN DIEGO UNION-TRIB., Feb. 24, 2001, at B5 (noting that San Diego's Association of Governments Sand Replenishment Project will cost over \$17 million).

54. *See also* Janet Adams, *Proposition 20—A Citizen's Campaign*, 24 SYRACUSE L. REV. 1019 (1973) (describing the background of the bill that created the coastal act). *See also generally* STANLEY SCOTT, *GOVERNING CALIFORNIA'S COAST* (1975).

55. *See* SCOTT, *supra* note 54, at 6 (noting that only 260 miles of coast was accessible to the public).

56. *Id.* at 7.

57. *See id.* at 119-24. "California Legislature's Joint Committee on Open Space Land found that 52.9% of city planning commission . . . [and] 62.3 percent of county planning commission members were persons who represented direct or indirect 'beneficial interests.'" *Id.* at 120. "The most corruptive force in government has to do with the use and development



that the power to make coastal development decisions needed to be removed from local jurisdictions and vested in a statewide agency.<sup>58</sup> Local control of coastal development decisions, in essence, amounted to uncontrolled development.

Reacting to concerns by environmentalists and the impending Federal Coastal Zone Management Act,<sup>59</sup> the California Legislature introduced six coastal act bills from 1970 to 1971, none of which passed into law.<sup>60</sup> In 1972, frustrated by the inability of the Legislature to pass a strong coastal act bill, conservationists successfully mounted a petition drive to get a coastal initiative on the ballot.<sup>61</sup> Proposition 20, the California Coastal Zone Conservation Act of 1972,<sup>62</sup> passed with over 55% of the vote despite well-funded opposition.<sup>63</sup>

Proposition 20 created one state-level and six regional coastal commission boards to review all coastal development permits. In addition, the coastal commissions were to submit a detailed coastal development plan to the Legislature by December 1, 1975. Most of the policies and suggested language in the California Coastal Plan was adopted as the California Coastal Act of 1976.<sup>64</sup>

### *B. The Legislative Record*

The legislative record supports the proposition that Coastal Act section 30235 was, in fact, simply a grandfather clause, intended to protect only structures existing before 1976. The legislative record displays this in three main ways. First, the Coastal Act was written by environmentalists and opposed by industry. The intent of the bill can be gleaned from reading the 1975 Coastal Plan from this context. Second, an analysis of the textual evolution of the bill in the legislative record supports the "grandfather clause"

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of land. The developers and the building industry have been extremely destructive in California . . . local government [has] been corrupted by these developers." *Id.* at 121 (quoting Richard Graves, former executive director of the League of California Cities).

58. See Adams, *supra* note 54, at 1023 (recounting why conservationists became frustrated with local government and eventually viewed local government as the enemy); SCOTT, *supra* note 54, at 7-8, ("until Proposition 20 passed, the coast was under the fragmented management of 15 counties, 45 cities, 42 state unites and 70 federal agencies (1972 figures)").

59. SCOTT, *supra* note 54, at 11-12.

60. *Id.* at 14.

61. Adams, *supra* note 54, at 1032; SCOTT, *supra* note 54, at 353-54. The Coastal Alliance and coalition of various environmental groups spearheaded the Proposition 20 initiative drive after legislative efforts to pass a strong coastal bill failed in 1971. *Id.*

62. CAL. PUB. RES. CODE §§ 27000-27650 (1972) *repealed* by Coastal Act of 1976.

63. SCOTT, *supra* note 54, at 357. Opposition included Bechtel Corp., General Electric Co., Southern California Edison Co., Standard Oil Co. of California, Mobil Oil Corp., Gulf Oil Corp., Occidental Petrol Co., Texaco Inc., Irvine Company (developer), Southern Pacific Land Company, Teamsters and the California Real Estate Association (partial list).

64. See Coastal Act § 30002 (2001).

*C. Legislative Intent as Determined by the 1975 California Coastal Plan*

The California Coastal Plan of 1975 (Coastal Plan), mandated by Proposition 20, became the primary basis for SB 1277 (Smith-Beilenson), which was eventually adopted as the Coastal Act of 1976.<sup>74</sup> The importance of the Coastal Plan is explicitly recognized in Coastal Act section 30002(a), which states, "The California Coastal Zone Conservation Commission . . . has prepared a plan for the orderly, long-range conservation, use and management of the natural, scenic, cultural, recreational, and man-made resources of the coastal zone." Coastal Act section 30002(b) states, "Such plan contains a series of recommendations which require implementation by the Legislature and that some of those recommendations are appropriate for immediate implementation as provided for in this division while others require additional review." It is evident from the language, however, which recommendations contained in the 1975 Coastal Plan required additional legislation for future implementation and which recommendations were codified within the Act.<sup>75</sup> By comparing the language of the Plan with that of the Coastal Act, it is clear that the Plan with regard to bluff setbacks and shoreline protection was codified.

The California Coastal Plan also sheds light on what the Commissioners and Legislature considered important in 1976. The first indication of concern about seawalls appears in the "Major Findings" section of the Plan. The purpose of the Plan is evident from its title: Protect Against Harmful Effects of Seawalls, Breakwaters, and Other Shoreline Structures. It states: "Seawalls, breakwaters, groins, and other structures near the shoreline can detract from the scenic appearance of the oceanfront and can affect the supply of beach sand."<sup>76</sup> The Plan limits the construction of shoreline structures to those necessary to protect existing buildings and public facilities and for beach protection and restoration. Special design considerations were proposed to ensure continued sand supply to beaches, to provide for public access, and to minimize the visual impact of the structures.<sup>77</sup>

This language (as well as other language encompassed in Policy 19 of the Coastal Plan ) is very similar to the language encompassed in section 30235. Policy 19 states:

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lute. . . ." Zoning laws have been upheld by the courts since 1926). *See* Coastal Act § 30007.5 (2001) ("in carrying out the [Coastal Act] . . . conflicts [shall] be resolved in a manner which on balance is the most protective of significant coastal resources.").

74. Coastal Act § 30002 (2001).

75. *See, e.g.*, California Coastal Plan 84 (1975) (Policy 68) ("[I]t is *recommended* that State legislation be enacted to assure that, if for any reason new structures . . . are built in high geologic hazard areas . . . there shall be no public assistance for such construction or reconstruction." (emphasis added)).

76. *Id.* at 18.

77. *Id.* at 45.

contention, because “existing” was intentionally inserted into the final version of the bill. Finally, a comparison of the language of the Coastal Act to the competing coastal act bills, which were not passed into law, demonstrates a fundamentally different approach to shoreline armoring. A thorough analysis of the legislative record leaves little doubt that Coastal Act section 30235 intended to protect only those structures existing at the time of the passage of the Coastal Act.

The Coastal Alliance consisted of a coalition of environmental groups specifically formed to push for comprehensive legislation for the preservation of the California coast.<sup>65</sup> Unfortunately, legislative efforts to pass comprehensive coastal conservation bills were repeatedly killed off in committee by special interest groups.<sup>66</sup> In 1972, frustrated by the lack of success in the legislature, the Coastal Alliance took a strong coastal bill that had died in committee, stripped it of its “compromise” amendments, and presented the bill to the public as Proposition 20.<sup>67</sup> The Coastal Act was a bill written by environmentalists, not developers or legislative representatives.<sup>68</sup>

Proposition 20, the California Coastal Zone Conservation Act of 1972, created one state-level Coastal Commission and six regional Coastal Commissions, which were to oversee development and planning until a comprehensive Coastal Act could be enacted.<sup>69</sup> Additionally, the Coastal Commissions were to “[p]repare a comprehensive, coordinated, enforceable [coastal development] plan for the orderly, long-range conservation and management of the natural resources of the coastal zone,”<sup>70</sup> and “on or before December 1, 1975, . . . submit [the plan] to the legislature for its adoption and implementation.”<sup>71</sup> Many of the recommendations and findings included in the 1975 California Coastal Plan were implemented into the California Coastal Act, primarily because the coastal act bill, SB 1277 (Smith-Beilenson), supported by conservationists, was enacted over competing developer-friendly bills.<sup>72</sup> The policies and recommendations of the Coastal Plan and, subsequently, SB 1277 (Coastal Act) were intended to protect natural resources over development.<sup>73</sup>

65. See Adams, *supra* note 54, at 1026.

66. See *id.* at 1029-32 (recounting legislative efforts to pass a coastal bill in 1970-1972).

67. *Id.* at 1033.

68. See generally *id.* at 1019.

69. CAL. PUB. RES. CODE § 27001(d) (1972) *repealed by* Coastal Act of 1976.

70. CAL. PUB. RES. CODE § 27001(b) (1972) *repealed by* Coastal Act of 1976.

71. CAL. PUB. RES. CODE § 27320(c) (1972) *repealed by* Coastal Act of 1976.

72. SB 1277 (Smith, D-Saratoga) (1976). The competing bills AB 3875 (Keene) and AB 3402 (Cullen) were respectively characterized as a “bulldozer in sheep’s clothing” and a “bulldozer without even the sheep’s clothing.” Press release from the Planning and Conservation League (July 26, 1976) (on file with author).

73. See, e.g., SB 1277 30001 (a) (“That the California coastal zone is a distinct and valuable natural resource belonging to all the people and exists as a delicately balanced ecosystem”); See California Coastal Plan (1975) at 19 (explaining that property rights are not abso-

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted only when designed to eliminate or mitigate adverse impacts on shoreline sand systems and when required (1) to maintain public recreation areas or to serve necessary public service . . . where there is no less environmentally harmful alternative, or (2) to protect principal structures of existing development that are in danger from present erosion where the coastal agency determines that the public interest would be better served by protecting the existing structures than in protecting the natural shoreline process.<sup>78</sup>

Policy 19 is instructive in that it is clearly codified in Coastal Act section 30235.<sup>79</sup> Policy 19 demonstrates that the authors of the Plan were aware of the problems associated with shoreline protection, that protecting private property may be in conflict with the public interest, and that shoreline protection should *only* be granted if it was in the public's interest even if the structure already existed prior to the Act! Thus, according to the Coastal Commissioners in 1975, the Coastal Act would grant shoreline protection only if (1) adverse effects were mitigated, (2) it protected an existing structure, *and* (3) it was in the public's interest.

However, assuming that the Commission was unclear with regard to the definition of "existing" within Policy 19, other sections of the Coastal Plan leave little doubt that shoreline protection was not appropriate for development subsequent to the enactment of the Coastal Act. For example, Policy 67, *Geologic Safety Review and Regulation for New Development*, states:

All *proposed* structures for human occupancy in [an area] of high geologic hazard shall be reviewed and regulated to avoid risk to life and property:

(a) areas of high geologic hazard include seismic hazard areas, . . . unstable bluff and cliff areas, beaches subject to erosion, and others;

....

(g) replacement structures in locations where previous structures have been rendered unfit for human occupancy by geologic instability shall only be permitted if they can successfully withstand the same instability.<sup>80</sup>

Policy 68, *Prevent Public Subsidy for Hazardous Developments*, states:

It is recommended that State legislation be enacted that if for any reason new structures are built in high geologic areas . . . there shall be no public

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78. *Id.*

79. Coastal Act § 30235:

[s]eawalls . . . and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect existing structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply.

*Id.*

80. California Coastal Plan at 87-88 (codified as Coastal Act § 30211).

assistance for such construction or reconstruction and no presumption of public liability for property loss.<sup>81</sup>

Policy 70, *Regulate Bluff and Cliff Developments for Geologic Safety*, states:

Bluff and cliff developments shall be permitted if design and setbacks are adequate to assure stability and structural integrity for the expected economic lifespan of the development and if the development will neither create nor contribute significantly to erosional problems or geologic instability . . . bluff protection works may be permitted only in accordance with policy 19. With that exception, no new lot shall be created or new structure built that would increase the need for bluff protection works.<sup>82</sup>

Policy 70, which is codified as Coastal Act section 30253, has a very important characteristic: it refers back to policy 19 (codified as section 30235). This demonstrates the Legislature's intent that Coastal Act sections 30235 and 30253 be interpreted together. The practical consequence for coastal landowners is that if they violate the setback requirement under Coastal Act section 30253, they should not be able to argue that they deserve protection under Coastal Act section 30235 (seawalls for existing structures).<sup>83</sup>

Finally, there is also substantial evidence in the Coastal Plan, in addition to the specific policy recommendations, that the Commissioners understood the coastal processes, the costs to the public, and the solutions.<sup>84</sup> For example, the plan explicitly states that sand replenishment was very expensive.<sup>85</sup> It is clear that the Commissioners understood the private property rights issues and instead chose to protect public rights.<sup>86</sup> There is little doubt that the authors of the Coastal Plan never intended to permit seawalls for development built after the Coastal Act.

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81. *Id.* at 88.

82. *Id.* at 89.

83. See Coastal Act § 30007.5 (2001) ("[C]onflicts [within the Coastal Act are to] be resolved in a manner which on balance is the most protective of significant coastal resources.").

84. See, e.g., California Coastal Plan. "Bluff Protective works are costly and involve problems . . . these measure can be extremely costly, may be unsightly in the cases of retaining walls, may interfere with access along the shore, may require continual sources of sand for replenishment . . . a decrease in sand supply . . . when artificial protective measures interfere with natural bluff erosion process." *Id.* at 89.

85. See *id.* at 44 (noting that replenishing Doheny State Beach cost over \$1 million).

86. See, e.g., Policy 19 (protection of private property would only be allowed when the Commission holds that protecting the existing structure is in the public interest).

*D. Direct Legislative History Argues Against a Liberal Construction of  
“Existing”*

The legislative evolution of the bill that was enacted as the Coastal Act, SB 1277, provides strong evidence that the insertion of “existing” into section 30235 was a distinct policy choice made by the legislature in 1976.<sup>87</sup> Early versions of SB 1277 stated in section 30204 (later renumbered section 30235), “Revetments, breakwaters, groins . . . seawalls, cliff retaining walls and other such construction that alters the natural shoreline process shall be permitted when required to serve coastal-dependent uses or *to protect structures*, developments, beaches, or cliffs in danger from erosion . . . .”<sup>88</sup>

The early version of SB 1277 did not include the word “existing” before “structure” and would have allowed any structure or even “developments, beaches or cliffs in danger from erosion” to have a seawall. However, this was quickly modified in committee. The next version struck the phrase “developments, and cliffs in danger from erosion” from the bill and on January 19, 1976, in what became the final version of section 30235, the word “existing” was inserted before “structures.”

To further emphasize the importance of the addition of “existing,” the competing bills, which were considered the “developer friendly” Coastal Act bills,<sup>89</sup> did not add the word “existing” before “structure” and included the protection of cliffs as a legitimate reason to permit seawalls. For example, AB 3875 section 30007 reads, “[S]eawalls . . . shall be permitted when required to serve coastal-related uses or to protect structures, developments, beaches or cliffs in danger from erosion. . . .”<sup>90</sup> Obviously, the competing coastal act bills could have resulted in the complete armoring of almost the entire California coast and would have entitled any structure in danger from erosion a seawall.

However, SB 1277 was enacted<sup>91</sup> and, therefore, was the intent of the legislature. The Smith-Beilenson bill (SB 1277) inserted the word “existing” into the Coastal Act in committee, because it intended to distinguish between structures built after 1976 and those structures built before 1976 that warranted protection. To interpret the language otherwise would give effect to versions of coastal act bills that were not enacted.

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87. S.B. 1277 (Ca. 1976).

88. S.B. 1277 (Ca. 1975).

89. See Press Release of the Planning and Conservation League, *supra* note 72.

90. A.B. 3875 § 30007 (Ca. 1975).

91. Coastal Act § 30000 et seq. (2001).

*E. Textual Analysis Requires that "Existing" be Interpreted as a Grandfather Clause.*

As already stated, Coastal Act section 30235 is currently interpreted by the Coastal Commission as mandating shoreline armoring when a structure is in danger from erosion, regardless of when the structure was built. While this may seem to be a reasonable interpretation, close textual analysis indicates that the current interpretation does not conform to the intent of the Legislature when writing the Coastal Act.

Coastal Act section 30235 states:

Revetments, breakwaters, groins, harbor channels, seawalls, cliff retaining walls, and other such construction that alters natural shoreline processes shall be permitted when required to serve coastal-dependent uses or to protect *existing* structures or public beaches in danger from erosion, and when designed to eliminate or mitigate adverse impacts on local shoreline sand supply. *Existing* marine structures causing water stagnation contributing to pollution problems and fish kills should be phased out or upgraded where feasible.<sup>92</sup>

It is standard in statutory construction that every word is important and is given effect.<sup>93</sup> One could possibly argue that the words "existing structures" were intended to distinguish between protecting empty lots from lots having structures already on them. Such interpretation, however, would not necessitate adding "existing" before "structures." The statute without the modifying adjective "existing" would have this meaning. In other words, the word "structures" precludes protecting future structures, without requiring the word "existing." Taking the prior argument to the extreme, a structure would deserve protection moments after completion; as soon as there were four walls, a roof, and dry paint. Furthermore, the every-completed-structure-is-"existing" interpretation would bring Coastal Act section 30235 into conflict with Coastal Act section 30253.

Coastal Act section 30253(2) states: "[New development shall] neither create nor contribute significantly to erosion . . . or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs."<sup>94</sup> If the interpretation requires protection of structures regardless of when they were built, the setback requirements of Coastal Act section 30253 are meaningless. Coastal landowners would be encouraged to ignore setback requirements, because they were guaranteed a seawall as soon as their "existing" structure was in danger from erosion.

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92. Coastal Act § 30235 (2001) (emphasis added).

93. NORMAN J. SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 46.06, at 119-20 (5th ed. 1992).

94. Coastal Act § 30235(2) (2001).

This cannot have been the intention of the drafters of the Coastal Act. The setback requirement for new development is mandatory and unambiguous: "New development *shall* [not] require the construction of protective devices."<sup>95</sup> The only way to keep section 30235 consistent with section 30253 is to distinguish "new development" from "existing." In other words, new development (after 1976) shall not be allowed a seawall; existing development (prior 1976) shall be permitted to have a seawall when in danger from erosion.

Furthermore, Coastal Act section 30007.5 requires "conflicts [within the Coastal Act] be resolved in a manner which on balance is the most protective of significant coastal resources."<sup>96</sup> Coastal Act sections 30235 and 30253 were intended to be interpreted together.<sup>97</sup> But even if they were not part of the same subset of policies, Coastal Act section 30007.5 requires that they be interpreted in a manner most protective of the coastal resource. The only way to bring them out of conflict is to interpret "existing structures" as those structures already existing at the time of the Coastal Act.

Finally, "existing" is used twice in section 30235; once before "structures" and once later in the statute: "[S]eawalls. . . shall be permitted when required . . . to protect *existing* structures. . . . *Existing* marine structures causing water stagnation contributing to pollution problems and fishkills should be phased out or upgraded where feasible."<sup>98</sup> Statutory construction demands, at the very least, consistency within a section.<sup>99</sup> It seems clear the legislature was intending to phase out marine structures presently existing at the time of the passage of the Coastal Act. Any other interpretation would be absurd. Thus, in order to interpret the word "existing" consistently within section 30235, necessitates a grandfather clause interpretation of "existing." The intentional placement of "existing" as a modifying adjective before "structures" must mean existing before 1976 (passage of the Coastal Act). Any other statutory construction would simply not require the word.

In summary, there are three reasons why any textual analysis must come to the conclusion that "existing" must be interpreted as existing at the time of the Coastal Act. First, the alternative interpretation of "existing" would not necessitate the inclusion of the word "existing" in the statute. Second, the alternative interpretation would be inconsistent with other sections of the Coastal Act. Finally, the alternative interpretation would create an inconsistency within Coastal Act section 30235.

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95. Coastal Act § 30253 (2001) (emphasis added).

96. Coastal Act § 30007.5 (2001).

97. See interplay between Coastal Plan policy 19 and policy 70, *supra* pp. 264-66.

98. Coastal Act § 30235 (2001) (emphasis added).

99. See SINGER, *supra* note 93, § 46.06, at 120.



## IV. CASELAW

Coastal homeowners often believe that they have a Constitutional property right to protect their property from erosion by building a seawall.<sup>100</sup> Any change in current Coastal Act policy with regard to shoreline armoring, or a Coastal Commission decision denying a seawall to a particular property owner, will be challenged as an unconstitutional legislative taking. The pre-eminent case for legislative takings is *Lucas v. South Carolina Coastal Council*,<sup>101</sup> where the U. S. Supreme Court held that “[compensation is required] where the State seeks to sustain regulation that deprives land of all economically beneficial use.”<sup>102</sup> Justice Scalia, writing for the majority, went on to warn, “[A]ny limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State’s law of property and nuisance already place upon land ownership.”<sup>103</sup> Thus, any regulation that deprives a landowner of all economically beneficial use of his property, and is not based in a State’s background property laws, requires compensation in order to be considered Constitutional.

California has not litigated whether denying a landowner permission to build a seawall amounts to a legislative taking, but indirect case law would seem to indicate that a seawall ban would not be considered a taking. Furthermore, courts in other states have directly held that there is no Constitutional right to build shoreline armoring.<sup>104</sup>

North Carolina, in *Shell Island Homeowners Ass’n v. Tomlinson*,<sup>105</sup> dealt directly with whether a ban on the construction of a “permanent hardened erosion control structure” was Constitutional.<sup>106</sup> In *Shell Island*, the North Carolina Court of Appeals ruled that North Carolina’s “hardened structure rule,”<sup>107</sup> which denied permanent shoreline armoring for a hotel, did not

100. See, e.g., *Whalers Village Club v. Cal. Coastal Comm’n*, 173 Cal. App. 3d 240, 252 (1985) (noting that the respondent believes they have a “[Constitutional] right to protect one’s home from destruction”). On a personal note, at the many Coastal Commission hearings I have attended, I have yet to meet a coastal homeowner who did not declare they have a Constitutional right to a seawall.

101. See Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 543 (1995) (calling *Lucas* “the much-heralded [takings] case”). *Lucas* has been discussed or cited in 2525 cases (citation history as of July 5, 2001, in WESTLAW, KC citations).

102. 505 U.S. 1003, 1027 (1992).

103. *Id.* at 1029.

104. See, e.g., *Shell Island Homeowners Ass’n v. Tomlinson*, 134 N.C. App. 217 (1999), *Stevens v. City of Cannon Beach*, 317 Or. 131 (1993).

105. *Facts at Shell Island Homeowners Ass’n v. Tomlinson*, 124 N.C. App. 286 (1999).

106. *Shell Island*, 134 N.C. App. at 220. Plaintiffs argued “[t]he protection of property from erosion is an essential right of property owners.” *Id.* at 228.

107. 15A NCAC 7H.0308(a)(1)(B).

amount to a regulatory taking, inverse condemnation, and was not a violation of equal protection or due process.<sup>108</sup> The court noted:

[P]laintiffs have failed to cite to this Court any persuasive authority for the proposition that a littoral or riparian landowner has a right to erect hardened structures in statutorily designated areas of environmental concern to protect their property from erosion and migration . . . [t]he owner of the riparian land thus loses title to such portions as are so worn or washed away or encroached upon by the water. . . . Its title was divested by "the sledge hammering seas, the inscrutable tides of God."<sup>109</sup>

The court further explained that the "hardened structure rule" was not denial of due process or equal protection, because the right to build a seawall is not a fundamental right under the Constitution, and the hardened structure rule is "clearly rationally related to the legitimate government end."<sup>110</sup> Finally, almost as a side-note regarding *Lucas*, the court found that the regulations were in place when the hotel (the original structure) was permitted, and therefore there was no compensable taking by reason of the regulations.<sup>111</sup>

Oregon took a different tact in defending the Oregon Beach Bill. OAR 736-20-010(6) states, "[P]ermit applications for beachfront protective structures seaward of the beach zone line (the dry sand vegetation line), will be considered only where development existed on January 1, 1977. The proposed project will be evaluated against the applicable criteria included within [the beach bill]."<sup>112</sup>

The Oregon Beach Bill's restriction of seawalls was challenged in *Stevens v. City of Cannon Beach*.<sup>113</sup> The plaintiff, relying on *Lucas*, claimed that the denial of a seawall amounted to a legislative taking because the "ordinance deprive[d] them of all economically viable use of their property."<sup>114</sup> The interesting part of *Stevens* is not simply the fact that the Court rejected the plaintiff's arguments, concluding that there was not a legislative taking, but how the Court reached its conclusion.

In Oregon, the public has a common law and statutory right to use the dry sand area of the beach.<sup>115</sup> The Court explained:

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Permanent erosion control structures may cause significant adverse impacts on the value and enjoyment of adjacent properties or public access to and use of the ocean beach, and, therefore, are prohibited. Such structures include, but are not limited to: bulkheads; seawalls; revetments; jetties; groins and breakwaters.

As cited in *Shell Island*, 134 N.C. App. at 219.

108. *Shell Island*, 134 N.C. App. at 231-33.

109. *Id.* at 228 (citations omitted).

110. *Id.* at 233.

111. *Id.* at 231.

112. *Stevens v. City of Cannon Beach*, 317 Or. 131, 145 (1993).

113. *Id.* at 146.

114. *Id.* at 147.

115. *See id.* at 138 (quoting *Thornton v. Hay*, 254 Or. 584 (1969)).

When plaintiffs took title to their land, they were on notice that exclusive use of the dry sand areas was not part of the "bundle of rights" that they acquired, because public use of dry sand areas "is so notorious that notice of the custom on the part of persons buying land along the shore must be presumed."<sup>116</sup>

The Oregon Supreme Court, applying language from *Lucas*, held that compensation was not required because the "plaintiffs have never had the property interests that they claim were taken by [the regulation]."<sup>117</sup> Thus, the Oregon Supreme Court held, even under the strict standards of *Lucas*, that a ban on seawalls did not amount to a legislative taking of property under the U.S. Constitution.

Although there have not been any cases in California that directly deal with the denial of a seawall,<sup>118</sup> case law seems to indicate that there is no Constitutional right to a seawall.<sup>119</sup> For example, in *Whaler's Village Club v. Cal. Coastal Comm'n*,<sup>120</sup> the Court of Appeals stated, "a fundamental right to protect one's property under the [California] Constitution (CAL. CONST., art. 1 sec. 1)"<sup>121</sup> is not the equivalent of a vested right to protect property in a particular manner where the method chosen is one that is regulated by government."<sup>122</sup> The Court went on to point out, "It is now a fundamental axiom in the law that one may not do with his property as he pleases; his use is subject to reasonable restraints to avoid societal detriment. . . ."<sup>123</sup>

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116. *Stevens*, 317 Or. at 143 (citations omitted).

117. *Id.* *Stevens* relied heavily on *Lucas*, which held:

Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with.

*Lucas*, 505 U.S. at 1027.

118. California courts have generally battled over whether the Coastal Commission could enforce conditions, such as mitigation or dedications of easements, in exchange for a seawall. See *Whaler's Village Club v. Cal. Coastal Comm'n*, 173 Cal. App. 3d 240, 261 (1985) (holding that because seawalls were likely to exacerbate erosion of the public beach, a dedication of an easement was an appropriate condition). *Contra* *Surfside Colony v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260 (1991) (holding that there was not a sufficient nexus between the private community's revetment and erosion to the public beach to justify a public access easement).

119. See *Barrie v. Cal. Coastal Comm'n*, 196 Cal. App. 3d 8 (1987).

120. *Whaler's Village*, 173 Cal. App. 3d at 240.

121. CAL. CONST. art. 1, § 1 ("Inalienable rights: All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy.") (emphasis added).

122. *Whaler's Village*, 173 Cal. App. 3d at 252-53. See also *Barrie*, 196 Cal. App. 3d at 18 (holding that there is no vested right in an emergency seawall and upholding *Whaler's Village*).

123. *Whaler's Village*, 173 Cal. App. 3d at 253 (citing *People v. Byers*, 90 Cal. App. 3d 140, 147-48 (1979); *HFH, Ltd. v. Super. Ct.*, 15 Cal. 3d 508, 515 (1975)).

In *Scott v. City of Del Mar*, the City declared that shoreline armoring encroaching upon the public's land was a nuisance *per se*.<sup>124</sup> The plaintiff refused to remove their encroachments and sought to recover under inverse condemnation when the City forcibly removed the plaintiff's seawall and patio.<sup>125</sup> The Court of Appeals denied relief to the plaintiff and upheld the City's right to legislatively declare seawalls nuisances *per se*, stating, "Del Mar's abatement of the encroachments [seawalls] on public land was a reasonable exercise of its police power, which does not give rise to an inverse condemnation action."<sup>126</sup>

Unfortunately, in California, the right to build shoreline armoring has not been litigated. Most of the cases have questioned whether the Coastal Commission properly imposed conditions when permitting a seawall.<sup>127</sup> In *Barrie v. Cal. Coastal Comm'n*, the issue was whether the Coastal Commission could compel a homeowner to relocate their seawall that had been built under an emergency permit.<sup>128</sup> Although, the court noted in *Barrie*: "An individual has no vested right to protect property in a particular manner where the method chosen is one that is regulated by [the] government,"<sup>129</sup> the court was not determining whether there was a general right to build a seawall, but only whether there was a vested right to a seawall in the specific location allowed by an emergency permit.<sup>130</sup> The court held that homeowners do not have a vested right to a seawall at a location allowed under an emergency permit.<sup>131</sup>

Similarly, in *Whaler's Village Club v. Cal. Coastal Comm'n*, the court held that there was not a Constitutional right to own property free from regulation, and was simply determining whether the conditions placed on the permit for the seawall were reasonable.<sup>132</sup> The court stated, "The original building permits for construction of residences did not give respondent a preexisting right to unregulated new construction. Moreover, the [Coastal]

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124. 58 Cal. App. 4th 1296, 1305 (1997). The city declared the encroachments nuisances *per se* because the seawalls increased erosion and they blocked public access. *Id.* at 1306.

125. *Id.* at 1301.

126. *Id.* at 1307. The court also held that diminution in value for removing the seawalls did not amount to a compensable taking. *Id.*

127. See *Surfside Colony v. Cal. Coastal Comm'n*, 226 Cal. App. 3d 1260, 1260 (1991) (holding that there was an insufficient nexus between the city's revetment and erosion to the public beach to justify a public access easement). Cf. *Whaler's Village*, 173 Cal. App. 3d at 261 (holding that because seawalls were likely to exacerbate erosion of the public beach, a dedication of an easement was an appropriate condition).

128. *Barrie v. Cal. Coastal Comm'n*, 196 Cal. App. 3d 8, 8 (1987).

129. *Id.* at 15 (quoting *Whaler's Village*).

130. The seawall encroached fifteen feet onto public land. *Barrie*, 196 Cal. App. 3d at 13.

131. *Id.* at 18.

132. *Whaler's Village*, 173 Cal. App. 3d at 253-54.

Commission did not deny them the right to construct a revetment. The question is only the reasonableness of the conditions attached.”<sup>133</sup>

Thus, the right to protect one’s home with a revetment or a seawall has not been decided in California. One could reasonably argue that, according to *Whaler’s Village*, there is a right to protect one’s home from erosion under the California Constitution,<sup>134</sup> but that right is qualified by regulations on how, when, and where the shoreline armoring will be built.<sup>135</sup> But other language in *Whaler’s Village* appears to contradict this line of reasoning: “Respondent’s ‘right’ to construct a new such revetment in a coastal area, an area of public trust, is not a right ‘already possessed’ or ‘legitimately required.’ Respondent’s use of its property must be subject to ‘reasonable restraints to avoid society detriment,’”<sup>136</sup> which would seem to preclude damaging the public’s property by building a seawall.

Furthermore, it is clear from *Scott v. City of Del Mar* that seawalls and revetments may be declared a nuisance *per se*.<sup>137</sup> However, in *Scott* the seawalls and revetments were encroaching upon public land.<sup>138</sup> Does legislative power to declare seawalls a nuisance *per se* extend to seawalls and revetments completely on private land?<sup>139</sup> The Supreme Court has upheld ordinances against private land use on the basis of a public nuisance.<sup>140</sup>

It is likely that a policy relying on both the public trust doctrine and nuisance principles to ban seawalls would pass Constitutional muster. The legislative history of the Coastal Act indicates that the legislature was concerned with the considerable adverse impacts of shoreline armoring when Coastal Act section 30235 was being formulated.<sup>141</sup> Furthermore, as demonstrated by the review of cases above, both within California and in other states, protecting one’s home with shoreline armoring is not a fundamental, Constitutional right. Finally, the simple fact that other states ban seawalls<sup>142</sup> should indicate that California would have little Constitutional difficulty in

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133. *Id.*

134. CAL. CONST. art 1, § 1.

135. *Whaler’s Village*, 173 Cal. App. 3d at 253-54.

136. *Id.* at 253 (citations omitted).

137. 58 Cal. App. 4th at 1305-06.

138. *Id.* at 1306.

139. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1026 (1992) (warning that “a noxious-use justification [for regulation] cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated”).

140. See, e.g., *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (prohibiting brickyard in Los Angeles because of noxious fumes); *Goldblatt v. Hempstead*, 369 U.S. 590 (1962) (prohibiting mining operation that was interfering with water supply).

141. See California Coastal Plan 89 (1975).

142. Tina Bernd-Cohen & Melissa Gordon, STATE COASTAL MANAGEMENT EFFECTIVENESS IN PROTECTING BEACHES, DUNES, BLUFFS, ROCKY SHORES: A NATIONAL OVERVIEW (1998) (Oregon, South Carolina, North Carolina and Maine ban shoreline armoring).

either correctly interpreting the Coastal Act or amending the Coastal Act to ban seawalls.

## V. OPTIONS

There are three ways to change the current status quo and prevent the continued wallification of the California coast. The first option is to change the language in the Coastal Act through the legislature. The second option would be for the California Coastal Commission to interpret the Coastal Act as suggested above. The third option is to bring litigation against the Coastal Commission, mandating a correct interpretation of the Coastal Act.

Legislative repair of the Coastal Act would require the substitution of a single word. Changing Coastal Act section 30235 to read, "Seawalls *MAY* be permitted," instead of "*SHALL* be permitted," would give the Coastal Commission discretion in determining whether to permit specific homeowners a seawall. It would be up to the Coastal Commission to determine the merits of the specific seawall application.

A tough discretionary seawall policy would encourage better options such as removal or modification of the structure, better erosion resistant landscaping, and more sensible setbacks. However, it will always be difficult to deny specific homeowners protection in the form of a seawall when they are threatened with the loss of their homes.

Another possible legislative fix would be to simply define "existing." "Existing" could be defined as anything that was built before the passage of the Coastal Act, which would have much the same effect as I have suggested with the reinterpretation. "Existing" could also be defined as anything built before some specific date. Even if "existing" was given a date set after the passage of the Coastal Act, at the very least, there would be some areas spared from the adverse impacts of future seawalls. This option would not help Southern California, which is, at present, extensively developed.

A legislative solution is fraught with pitfalls. First of all, the beach erosion issue is not as clear-cut as it is in some states on the East Coast. The majority of sand on the East Coast is derived from lateral sand transport systems and the large continental shelf.<sup>143</sup> On the West Coast, rivers and streams deliver the majority of the sand.<sup>144</sup> Furthermore, there have been some studies suggesting that Pacific storms have become more powerful and now track farther south than in previous decades, which by implication is exacer-

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143. DEAN, *supra* note 1, at 22.

144. Griggs et al., *supra* note 21, at 14.

bating erosion.<sup>145</sup> Finally, on the East Coast, hurricanes periodically destroy large sections of coastal development.<sup>146</sup>

On the West Coast, although large storms do land, they do not have the same force as hurricanes.<sup>147</sup> Coastal destruction from large storms is localized and the dangers of building on the coast seem much more manageable (e.g. the possibility of building a seawall to protect a home).<sup>148</sup> Thus, the majority of people in California, who do not live directly on the coast, seem oblivious to the folly of building on the coast and the public costs of shoreline armoring. It will be difficult to gain broad public support to ban seawalls.

Another danger to opening up the Coastal Act to amendment through legislative action is the power of the coastal development interests. Coastal developers and property-rights groups, such as the Pacific Legal Foundation, already have been seeking to weaken the Coastal Act through amendment and the courts.<sup>149</sup> AB 2310 (D-Ducheny) is a prime example of the power of the development interests.<sup>150</sup> AB 2310, as originally drafted, would have denied the Coastal Commission jurisdiction to review wetlands development that had an approved Habitat Conservation Plan.<sup>151</sup> Habitat Conservation Plans would have become a back door to development inconsistent with the Coastal Act. Although AB 2310 was eventually weakened before adoption, it demonstrates the danger of amending the Coastal Act in the face of well-funded and well-connected opposition.

Any amendment that denied protection for coastal landowners would be challenged as an unconstitutional legislative taking. Although the Constitutional challenges may eventually fail, the amendment would be held up indefinitely in court pending challenge. One possible way to avoid Constitutional problems would be to include a compensation clause. However, this would also be fraught with difficulty.<sup>152</sup> What is the worth of a coastal prop-

145. David E. Graham, *Making Bigger Waves: Stronger Storms Raise Risk for S.D. Coastline*, SAN DIEGO UNION-TRIBUNE, Feb. 4, 2001, at B1 (citing a study by UCSD's Scripps Institute of Oceanography that waves are larger and more destructive than in the past).

146. See generally DEAN, *supra* note 1, at 134-54 (recounting damage from numerous hurricanes on the Eastern and Gulf Coasts).

147. Griggs et al., *supra* note 21, at 23.

148. See generally *id.* at 24 (discussing climate change and the mild climate from 1946 to 1976).

149. See, e.g., *Marine Forests Society v. Cal. Coastal Comm'n*, No. 00AS00567 (Sacramento Sup. Ct., filed Jan. 31, 2000) (appeal filed May 8, 2001); Terry Rodgers, *Coastal Panel Ruled Unconstitutional: Judge Finds Board Oversteps Authority*, SAN DIEGO UNION-TRIBUNE, Apr. 27, 2001, at A3.

150. See Seema Meeta, *New Wetlands Bill Would Check Bolsa Chica Ruling*, L.A. TIMES, Feb. 25, 2000, at B14.

151. Terry Rodgers, *Coastal Control is the Subject of Revived Bill*, SAN DIEGO UNION-TRIBUNE, May 16, 2000, at A3.

152. See Gary Griggs & Lauret Savoy, *Shoreline Protection and Engineering*, in LIVING WITH THE CALIFORNIA COAST 46, 74 (Gary Griggs & Lauret Savoy eds., 1985) (noting some

erty in danger from erosion? Many coastal lots have extremely large homes worth millions of dollars: would compensation include the fair market value of the home without erosion problems? Ultimately, a compensation scheme may be unworkably expensive and would drain State resources because of lawsuits aimed at increasing the amount of compensation a coastal landowner received from condemnation proceedings.<sup>153</sup>

Finally, finding a State representative to carry a bill is difficult and dangerous for the political career of anyone who undertakes this daunting proposition.<sup>154</sup> The coastal landowners' mantra, "save our homes," clearly carries huge emotional and political appeal.<sup>155</sup> The coastal landowner has the advantage of a simplistic argument that is difficult to counter even for officials who have a deep understanding of the issue.<sup>156</sup> In addition, coastal landowners are wealthy and politically savvy, whereas the general public has little understanding of the issues or the costs involved.

On the other side, beach advocates have a complicated, esoteric argument which does not boil down easily into a slogan. The damage caused by shoreline armoring takes longer to explain and includes a number of side issues that seem to support the coastal landowners' perspective. For example, dams, flood-control works, sand mining, and development in general reduce the sand supply before the sand reaches the coastline.<sup>157</sup> The damage caused by shoreline armoring is gradual in many cases and is not obvious to the casual observer.<sup>158</sup> However, without shoreline armoring, even a sand-starved beach will maintain a recreational beach, because the shoreline will erode.<sup>159</sup> It requires a deep understanding of the issues to understand why shoreline armoring costs more, in the long run, than the worth of the property threatened by erosion.<sup>160</sup> Thus, in my opinion, a legislative fix is clearly unworkable and doomed to failure.

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of the problems with condemnation or acquisition programs).

153. *But see id.* Griggs notes the limited resources of state and local governments, but ultimately concludes "condemnation may well become an increasingly common control technique." I disagree for the reasons stated above.

154. The Surfrider Foundation has approached a number of coastal state representatives but has not been successful in finding an "author" to carry an anti-seawall bill.

155. At the Coastal Commission hearing on March 13, 2001, a hearing that included three seawall permits, coastal landowners arrived with large buttons exclaiming "Save our Homes."

156. Coastal Commissioner Dettloff commented, "I do not think we [the Coastal Commission] have the guts to tell someone their house is going to fall into the Ocean [and deny a seawall]" (comments during the Coastal Commission hearing March 13, 2001).

157. *See* Stone, *supra* note 25, at 708. Seawalls, however greatly exacerbate erosion on a sand-starved beach. Terchunian, *supra* note 29, at 68.

158. *See* Pilkey & Wright, *supra* note 18, at 44 ("[S]eawall impact on beaches is often a long-term phenomenon").

159. Terchunian, *supra* note 29, at 67-68.

160. DEAN, *supra* note 1, at 16 (citing a report by Orrin H. Pilkey and James D. Howard which was submitted to President Reagan in 1982).



The second option is for the Coastal Commission to reinterpret the Coastal Act. Interpreting "existing" as only allowing protection to those structures built before the Coastal Act, although the correct interpretation, would require an incredible act of bravery on the part of the Coastal Commission. It will always be difficult to deny a homeowner protection when their property is clearly in danger.<sup>161</sup> Furthermore, the controversy over "existing" will continue. For example, does the small beach house that existed at the time of the Coastal Act deserve protection as an "existing structure" after it has been "remodeled" into a mansion? How much of the original structure must be remodeled before a structure is considered "new development"?

One option, which seems to be the current policy of the Coastal Commission, is to require deed restrictions in return for a development permit on a coastal bluff. Common deed restrictions include an admission of the danger of building in a geologically hazardous zone, a release of liability for the Coastal Commission and a promise not to build shoreline protection in the future, in return for a coastal development permit.<sup>162</sup> As of this date, the Coastal Commission has not enforced deed restrictions denying shoreline armoring.<sup>163</sup>

One purpose of deed restrictions is to counter the lack-of-knowledge argument. Although knowledge, or lack thereof, of the true consequences of unwise coastal development is not an element for consideration in a shoreline armoring permit, showing intentional or negligent disregard for coastal hazards may be crucial in the fight to deny shoreline armoring. In other words, knowledge and intent legally have no significance, but may be the critical element in providing courage to the Coastal Commission in denying shoreline armoring.

Presently, the coastal landowner provides a sympathetic image to the Coastal Commission by claiming that bluff erosion conditions were unknown at the time of development (i.e., did not violate Coastal Act section 30253 setback provisions). For example, in a recent case in Solana Beach, six property owners claimed that new information, a clean sand lens unknown at the time of building, created the need for immediate shoreline protection.<sup>164</sup> Likewise, in the Cliff's Hotel appeal in Pismo Beach, the Hotel claimed that undiscovered natural springs increased erosion (presumably to counter the accusation that the green, cliff-top lawn was exacerbating erosion).<sup>165</sup> Deed restrictions address this concern by providing constructive

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161. *See id.* at 68.

162. *See, e.g.*, Coastal Commission Staff Report CDP 6-99-103 (noting that some of the properties included deed restrictions specifically denying the ability to build shoreline armoring).

163. *Cf. Ojavan Investors v. Cal. Coastal Comm'n*, 26 Cal. App. 4th 516, 527 (1997) (upholding deed restrictions for transfer development credits).

164. CDP 6-99-103.

165. *See* Staff Report, A-3-PSB-98-049 (Cliff's Hotel Appeal).

knowledge to the coastal landowner that they are taking the risk and encouraging proper setback.

Another way to show constructive knowledge for those properties that do not include deed restrictions would be to investigate other legal instruments for those properties that have been significantly remodeled and sold. California law requires disclosure of geologic conditions upon sale of the house.<sup>166</sup> These documents, while not having a legal bearing regarding shoreline armoring, will have an enormous effect on the sympathy factor for the homeowner. The Coastal Commission, if it accepts the "grandfather clause" interpretation of section 30235, may be less likely to use their discretion to grant a permit when they believe a homeowner intentionally, or negligently, built too close to the bluff edge.

The final option is activist litigation against the Coastal Commission. In essence, coastal advocates must ask the judiciary to correctly interpret section 30235 and order the Coastal Commission to follow the "new" interpretation. Thus, changing the interpretation of the Coastal Act would require the Coastal Commission to continue to approve permits for shoreline armoring and coastal activists bringing suit against the Coastal Commission seeking a writ of mandamus.<sup>167</sup> This would require certain conditions to correctly target the interpretation of "existing" under the section 30235.<sup>168</sup>

First, the structure would need to be in imminent danger from erosion. There has been no case law that challenges the need for the structure to be in danger from erosion, and the Coastal Commission appears to routinely deny permits for structures not in danger from erosion.<sup>169</sup> A successful case decided on this aspect of section 30235 would have virtually no impact on the current practices, because most homeowners who request a seawall are clearly in danger from erosion. However, the structure should not be in immediate harm sufficient to qualify for an emergency permit.

Second, the property would ideally not include deed restrictions. Although deed restrictions are desirable if the Coastal Commission wishes to deny seawall applications, they essentially are a waiver of one's rights under the Coastal Act.<sup>170</sup> Furthermore, deed restrictions have been upheld in the coastal zone.<sup>171</sup> A successful suit upholding deed restrictions would not have an impact on current shoreline development practices.

A best-case scenario for bringing a lawsuit would be a case where the issue was focused solely on whether the structure could be considered existing. Thus, the facts of the case would ideally include: a primary structure

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166. CAL. CIV. CODE § 1102.6 (2001).

167. This concept was formulated through discussions with Doug Ardley, Esq. (Surfer's Environmental Alliance) and Mark Massara, Esq. (Coastal Director of the Sierra Club).

168. A victory or loss on other issues would not have a policy-changing effect.

169. See, e.g., Defendant's Brief at 4, *Cliff's Hotel v. Cal. Coastal Comm'n*, CV 080283.

170. *Ojavan Investors v. Cal. Coastal Comm'n*, 26 Cal. App. 4th 516, 527 (1997).

171. *Id.*

built after 1976, clearly in danger from erosion; no previous shoreline armoring; a design that adequately mitigates adverse impacts; and approval from the Coastal Commission.

This would be the preferable course of action for a number of reasons. First, there is a reasonable possibility that the court will rule that “existing” does in fact indicate an intent to protect only structures built before 1976 and that the Coastal Commission is violating the Coastal Act by approving shoreline armoring for any other structures.

If the court found otherwise, it would not change the current approval practices of the California Coastal Commission. In other words, an adverse ruling only preserves the status quo, although admittedly it would not allow the Coastal Commission to reinterpret the Coastal Act on its own. However, an adverse ruling that “existing” means any primary structure existing at the time of being in danger of erosion would not preclude a legislative fix.

I believe that those who argue that the courts are not an appropriate venue to change the interpretation of section 30235 have not adequately assessed the dangers of a legislative fix, the political climate, or the relatively low risk of litigation on this matter. A worst-case scenario of litigation would expend the time, effort and monetary resources of coastal advocates, but would not preclude other options.

There are other benefits as well. For example, if the Coastal Commission does deny a permit based on the fact that the structure was built after 1976, the Coastal Commission will be defending its interpretation of “existing” from wealthy landowners and private property rights groups. Coastal advocates will not be able to control who the defense attorney will be, nor how passionately the Coastal Commission will defend.<sup>172</sup> Although coastal advocates will be able to intervene as a defendant, there will be less control regarding the narrow issues presented. If the coastal advocate is the plaintiff, the issue going up for review can be intentionally kept narrow and the quality of the lawyer can be controlled.

## VI. CONCLUSION

Seawalls protect private property at the expense of the public beach. The purpose of this Comment was two-fold. First, I intended to inform the casual reader about the physical problems associated with seawalls and the current legal considerations regarding shoreline armoring. Second, I intended to provide tools to practitioners, policy makers, and decision-makers who wish to begin charting a course that fully protects the public’s beach.

The right to shoreline armoring is a highly contentious issue. Local and state officials often feel compelled to permit seawalls regardless of the ad-

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172. Ordinarily, the Attorney General defends the Coastal Commission. Sam Overton, Esq., Dan Olivas, Esq., and Jamee Jordan Patterson, Esq. (Deputy Attorneys General covering Central and Southern California) have competently defended the Coastal Commission.

verse impacts. I have heard on multiple occasions Coastal Commissioners lamenting that the law requires them to permit yet another seawall, and in certain circumstances the Commissioner is correct. However, for new development, built after 1976, there is no requirement to permit a seawall under the Coastal Act.

Other states have enacted complete bans on seawalls that have survived constitutional challenges.<sup>173</sup> California case law, although not directly on point, seems to indicate that there is no constitutional right to build a seawall.<sup>174</sup> Therefore any reinterpretation or amendment to section 30235 would likely also survive a legal challenge.

The Coastal Commission is finding it increasingly difficult to find the middle ground. It is impossible to ignore the fact that 150 miles of seawalls is, at the very least, having a disastrous cumulative impact on the availability of the recreational beach. Yet, the emotional appeals of homeowners are also impossible to ignore. Ultimately, compromise is not possible.<sup>175</sup> As Orrin H. Pilkey and Kathrine Dixon remind us: “you can have houses or you can have beaches; you cannot have both.”<sup>176</sup>

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173. *See generally* Shell Island Homeowners Assoc. v. Tomlinson, 134 N.C. App. 217 (1999); Stevens v. City of Cannon Beach, 317 Or. 131 (1993).

174. *See* Whaler's Village Club v. Cal. Coastal Comm'n, 173 Cal. App. 3d 240 (1985); Barrie v. Cal. Coastal Comm'n, 196 Cal. App. 3d 8 (1987); Scott v. City of Del Mar, 58 Cal. App. 4th 1269 (1997).

175. PILKEY & DIXON, *supra* note 5, at 53.

176. *Id.*

